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In The

Supreme Court of the United States

October Term, 1971

No. 71-382

GILES A. WANAMAKER, Jr.,

Petitioner,

vs.

JOHN C. RILEY,

Respondent.

REPLY BY PETITIONER TO MEMORANDUM FOR THE RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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INDEX

Page

Reply by Petitioner 1

Stare Decisis 2

Conflicting Courts of Appeals Decision 3

Summary Judgment Procedures and the Facts . . 4

Barr Distinguished 7

Other Inconsistencies and Errors 9

Conclusion 10

Table of Citations

CASES CITED:

Barr v. Matteo, 360 U.S. 564 . . . 2, 3, 4, 6, 7, 8, 10

Denman v. White, 316 F.2d 524 (1st Cir. 1963) 4, 6

Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965) . . 3, 4

STATUTES CITED:

Uniform Code of Military Justice:

10 U.S.C. 801 5

10 U.S.C. 815(b) 5

Index

Page

RULES CITED:

Rule 24(4) 1

OTHER AUTHORITIES CITED:

Comment, Legislative Immunity, 77 Yale L.J. 366 (1967) at 388 n. 135 4

United States Constitution, First Amendment. . 9

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Reply by Petitioner

To Memorandum for the Respondent in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

To the Chief Justice and Associate Justices of the United States Supreme Court.

Petitioner respectfully submits this Reply Brief pursuant to Rule 24(4), U.S. Supreme Court Rules, in reply to arguments raised in respondent's memorandum.

Stare Decisis

The Solicitor General raises the argument, in opposition to petitioner's point that the four-justice opinion in Barr v. Matteo, 360 U.S. 564, is not entitled to binding precedent under the doctrine of stare decisis (Pet. 6, 7), that "Whatever their other differences, five members of the Court agreed that such an absolute privilege must be recognized..." (Resp. 5). A careful reading of Mr. Justice Black's concurrence in Barr belies the Solicitor General's position:

> Mr. Justice Black, Concurring:
>
> I concur in the reversal of this judgment but briefly summarize my reasons because they are not altogether the same as those stated in the opinion of Mr. Justice Harlan. 360 U.S. at 576.

At no point in Justice Black's opinion is there any reference to or any mention of absolute privilege, executive immunity, or the establishment of any rule encompassing any such privilege. The language of the concurrence is clear in this respect. The Solicitor General does not contest (Resp. 4) the authorities cited by petitioner supporting the doctrine of stare decisis (Pet. 6, 7). So if a "rule...emerged from Barr..." (Resp. 5), it was clearly not entitled to be recognized as binding precedent. Assuming arguendo that the lower federal courts have followed the Barr "rule," (Resp. 5), this is certainly a compelling argument for this Court to grant this petition to provide the lower courts with the appropriate direction to which they are entitled.

Conflicting Courts of Appeals Decisions

Despite the Solicitor General's argument that Kelley v. Dunne, 344 F.2d 129 (1st Cir. 1965) did not reject Barr (Resp. 5, n. 2), the language of the decision makes it clear that the Harlan opinion in Barr was not followed. Chief Judge Aldrich reasoned that

> "[S]ince the doctrine of absolute immunity is based upon the relative importance of the public, as against a private, interest, application of the doctrine must vary with the relative weight of the competing interests." (Emphasis added.) 344 F.2d at 133.

Such a varying of the application of the doctrine according to "relative weight" does not follow Justice Harlan's opinion in Barr, which resolved the conflict entirely on the side of the public interest without any possibility of a varying of the elements. But Judge Aldrich goes on to say "In such a situation we see no compelling need to superimpose, absolutely, the public interest upon private rights." (Emphasis added.) 344 F.2d at 133 (Pet. 8). It is clear from the foregoing language that the Solicitor General is in error in his assertion that Kelley v. Dunne turned on a conclusion that the conduct involved was not within the official's duties, when the court specifically rejected the rationale of the Harlan opinion in Barr by the above statements.

As further support for the petitioner's assertion that the First Circuit has not adopted the absolute privilege rule as enuciated in Barr, see Comment,

Legislative Immunity, 77 Yale L.J. 366 (1967) at 388 n. 135: "For an intimation that lower courts may have found Barr too much to take, see Kelley v. Dunne...." Also see the discussion of Denman v. White, 316 F.2d 524 (1st Cir. 1963) on page 8 of the Petition. The courts of appeal are thus not uniform in their interpretation of Barr, and this Court should grant the petition to provide the proper guidance to the courts of appeal.

Summary Judgment Procedures and the Facts

Respondent through the Solicitor General argues that "there was no genuine issue of material fact to be submitted to, and resolved by, a jury" (Resp. 6). Such a conclusion is ill-founded and has no basis, as demonstrated by the following factors:

a. Petitioner has never requested a jury trial, and the record so reflects.

b. It appears to be a specious argument to conclude that there are no genuine issues of material fact (Resp. 6), when Judge McCree of the Sixth Circuit would remand for "an evidentiary hearing" to determine the factual issues in dispute (Pet App. 2a). Clearly if an appellate judge even in dissent can conclude that an evidentiary hearing is required, there are appropriate issues for the trier of facts to consider.

c. The trial judge in the Order Granting Motion for Summary Judgment, apparently had many reservations in his opinion. "This court, too, has struggled with this conflict... The question of slanderous statements in Count One is a close one..." (Pet. App. 5a). With these reservations

apparent at the district court level, and the dissent in the appellate court, the presumption in a summary motion proceeding that the facts must be considered that are most favorable to the respondent (on the motion) was not followed.

d. The trial judge in his Order made a finding of fact that "...the language used was stronger than necessary..." (Pet. App. 6a), however at no point did he define the term "necessary." If that term meant a necessity to maintain discipline, then clearly his decision was inconsistent with his finding, and respondent was in fact acting outside his scope of duty.

e. The Solicitor General's memorandum, purporting to argue that there are no genuine issues of material fact, solely treats the facts in four of the six pages of the memorandum. Absent from the memorandum, and from the record, is any attempt by respondent to define as a matter of fact the 'the outer perimeter' of respondent's duties. One way to do so would be to cite the Uniform Code of Military Justice, 10 USC 801 et seq. Article 15 of the UCMJ is the section which enumerates the specific duties of a military commander with respect to the maintenance of discipline and the punishment allowable for infractions.[1] Another way would be to file affidavits

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1. (b). . . any commanding officer may, in addition to or in lieu of admonition or reprimand, impose one or more of the following disciplinary punishments for minor offenses. . . (1) upon his officers of his command . . . 10 U.S.C. 815 (b).

It is clear that the above sets forth the standard for maintaining discipline. It follows that any other method, especially tortious conduct, is outside the commander's scope of duty.

of superior officers ratifying the disputed conduct, or to cite regulations or internal memoranda on the subject as was done in Denman v. White, supra, by the defendant. But none were filed or cited herein and the burden is upon respondent to support his motion in a summary judgment proceeding. See Petition p. 10. It is clear that respondent has not met his burden, and, assuming arguendo the Harlan opinion in Barr is upheld as a rule, the instant case should nevertheless be remanded for a factual determination of the limits of the scope of respondents duty.

f. The record shows ample material in the rebutting affidavits filed by petitioner either to reverse or to require an evidentiary hearing, despite respondent's assertion that there were no genuine issue of material fact (Resp. 6). Petitioner has filed sworn affidavits by independent witnesses that the statements were personal, informal and made in a casual context. One affidavit stated ". . . Al Wanamaker has embarrassed me personally." (emphasis added). See Petition p. 9.

In the court of appeals Reply Brief at p. R10, on file with the Clerk of this Court,[2] petitioner set forth extensive material rebutting the arguments for privilege set forth by the Solicitor General (Resp. 6). Those to whom respondent made the statements, admittedly military reservists, were primarily civilian citizens of Michigan where petitioner was a member of the bar. The fact that the statements, for the purposes of the motion, were made on federal property cannot be controlling. Selfridge

2. A copy of Petitioner's court of appeals Brief, Appendix and Reply Brief has been lodged with the Clerk of this Court.

Air Force Base (now Selfridge Air National Guard Base) had thousands of employees, both military and civilian, and had many of the facilities and attributes of a small city, as described more fully in the court of appeals Reply Brief at p. R10. There was thus ample factual material to rebut respondent's affidavit in total, and clearly enough to require an evidentiary hearing.

Barr Distinguished

a. The Solicitor General points out (Resp. 4) that the district court found that the statements made were 'internal' (Pet. App. 6a). This finding, if so, is completely opposite to Mr. Justice Harlan's rationale in his opinion in Barr, which is based on the public's right to know. Justice Harlan found that the statement under controversy, a press release by Defendant Barr, was ". . . a public statement of agency policy in respect to matters of wide public interest and concern . . ." 360 U.S. at 575. The Solicitor General thus is inconsistant in arguing that the privilege should be granted in 'internal' defamations, citing authority based on "wide public interest and concern."

b. The Harlan opinion in Barr contains the statement "The question is a close one . . ." (360 U.S. at 574), and then goes on to recite that the defendant in Barr was the acting director of an important agency in Washington having some 2500 employees (360 U.S. at 574 n.11), and was clothed by redelegation of certain powers conferred upon the President. In contrast, respondent here was a reserve lieutenant colonel, commander of 185 reservists who were tenants on an outlying installation in Michigan, and subject to the direct

operational control of the base commander and higher headquarters. Clearly, if Barr is "a close one," the instant case cannot also be a 'a close one' (Pet. App. 52).

c. This case epitomizes the fears foretold by Chief Justice Warren and Justice Douglas in their dissent to Barr twelve years ago:

> The record will probably (not). . . be satisfactory . . . with little more than bald assertions that a specific official has the power to do what resulted in the defamation . . . Since . . . these duties are rarely enumerated, an executive assertion on the official's behalf may place an impossible burden of proof on the plaintiff seeking to avoid the defense of absolute privilege. 360 U.S. at 579.

In the instant case, there is a bald assertion by the defendant (respondent) that he has the power to defame, but there are no Air Force regulations filed (to enumerate duties) nor are executive assertions filed - but nevertheless petitioner is faced with the impossible burden feared and deplored by Justices Warren and Douglas.

Also noteworthy is Mr. Justice Brennan's dissenting comment, also applicable here, that Mr. Justice Harlan's approach "seems to clothe with immunity the most obscure subforeman on an arsenal production line . . . who maliciously defames one he discharges." 360 U.S. at 587. The instant case is quite close to that omniscient characterization.

Other Inconsistencies and Errors

a. The Solicitor General published an excerpt from a deposition which was taken out of context (Resp. 3). The full text of that deposition showed that the deponent testified that he did not hear the newscast referred to, and thus that point is misleading. Rebutting excerpts from that deposition appear in petitioners court of appeals reply brief at page R2. As respondent's memorandum emphasizes the factual issues, this one is misleading and should be corrected.

b. A number of misstatements of fact appear in respondent's brief. Petitioner is branded as the head of dissidents, (Resp. 3) when there is no basis in the record to describe him as anything more than a 'spokesman'. Petitioner was characterized as criticizing the 'activation' of the reserve unit in the aftermath of the Pueblo seizure (Resp. 2), but the district court record shows that, in oral argument, respondent's attorney (the Assistant United States Attorney) emphasized that any criticism was not of the act of the recall, as characterized by the Solicitor General, but was aimed at the continued involuntary and unnecessary retention on active duty as petitioner's duties had no relationship to the emergency causing the recall. See plaintiff-appellant's Appendix in the court of appeals, P. A8, on file with the clerk of this court.

c. At no time in this matter had respondent ever taken the position that petitioner was not acting in perfect propriety within the scope of his First Amendment privilege. The only characterization of the public statements of petitioner, by respondent, appear in an unrebutted affidavit which attributes the words ". . . Al Wanamaker has embarrassed me

personally . . ." to respondent. At no time in this record or elsewhere has respondent ever identified a specific discipline or morale problem which resulted from public statements made by petitioner, and at no place in this record has respondent alleged that any acts by petitioner were in any way false or in violation of law or any military regulations.

Conclusion

Petitioner further contends that the decision in this case offends basic standards of fairness. It is anomalous that a government employee may have greater rights than members of the public ". . . citizens generally go through life subject to the risk that they may, though in the right, be subject to litigation and the possibility of a miscarriage of justice." 360 U.S. at 589, Mr. Justice Brennan's dissent. Government employees should have no greater rights.

In this reply, petitioner has shown that the Court should grant the Writ of Certiorari as Mr. Justice Harlan's opinion in Barr is not binding precedent, as that opinion has not been uniformly followed by the courts of appeal, and as the decision below sanctioned a departure from accepted judicial proceedings in not requiring an evidentiary hearing.

Respectfully submitted,

Giles A. Wanamaker, Jr.
in propria persona

November 1971